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SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1935

No. 667

THE "ARIZONA", ANTONE MARDESICH AND WIFE, PETER MARDESICH AND WIFE, AND GENERAL CASUALTY CO. OF AMERICA.

Petitioners,

vs.

ANTONIO ANELICH, AS ADMINISTRATRIX OF THE ESTATE OF MARIO ANELICH, DECEASED,

Respondent.

On a Petition for Writ of Certiorari to the Supreme Court of the State of Washington.

RESPONDENT'S BRIEF

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INDEX

Page

STATEMENT OF THE CASE 1

ARGUMENT 9

I. ASSUMPTION OF RISK 10

(a) When continuing to work with knowledge ..10

(b) Where no evidence of knowledge and only plea is as to ordinary risks. 44

II. SUFFICIENCY OF THE EVIDENCE 51

(a) Of negligence causing original injury 51

(b) As to negligence in rendering medical care and attention 59

III. CONCLUSION 76

CITATIONS
CASES

Page

Cortes v. Baltimore Insular Lines, 297 U. U. 367, 6 F. Supp. 604; 66 F. (2) 526; 52 F. (2) 22 ..... 65, 27
Chelentis v. Luckenbach SS. Co., 247 U. S. 372 15
Chesapeake & Ohio Ry. v. Winder 23 F. (2) 794 (C.C.A. 4th) 47
Chicago R. I. Co. v. Ward, 252 U. S. 19 58
C. & O. Ry. v. Proffitt, 241 U. S. 462 48
Cricket SS. Co. v. Parry, 263 F. (C.C.A. 2) 523 16
Dopico v. N. Y. Marine Co., 217 N. Y. S. 295 38
Fehler v. Montesano, 188 P. 5, 110 Wash. 143 50
Frescoln v. Puget Sound T. Co., 155 P. 395; 90 Wash. 59 ..72
Grimberg v. Admiral Oriental SS., 300 Fed. 619 (Wash.) 34
Grace & Co. v. Skaanes, 4 F. (2) 106 (C.C.A. 9th) 33
Gunning v. Cooley, 281 U. S. 90 52
Hansen v. U. S., 12 F. (2) 321 (Ga.) 56
Hansen v. Sandvik, 222 P. 205, 128 Wash. 60 50
Henry Gillen's Sons v. Fernald, 294 F. 520 (C.C.A. 2d) ..37
Howarth v. U. S. 24 F. (2) 374 (C.C.A. 2) 37
International Stevedoring Co. v. Haverty, 272 U. S. 50 25
Ives v. U. S. 58 F. (2) 201 (C.C.A. 2) 38
Johnson v. Panama Ry. Co., 264 U. S. 375 289 Fed. 964) 21
Johnson v. U. S., 74 F. (2) 703 42
Langness v. Green, 282 U. S. 532, 32 P. (2) 565 32 F. (2) 284 70
O'Brien v. Luckenbach SS. Co., 293 F. 170 48
Ranstrom v. Intern. S. Co. 277 P. 992, 152 Wash. 332.....58
Rasmussen v. Twin Harbor Co., 265 P. 1085; 147 Wash. 260 58
Reed v. Director of Railways, 258 U. S. 92 58
Southern Ry. v. Hermans, 44 F. (2) 366 33
Scheffler v. Moran Towing Co., 68 F. (2) 11 33-41
Storgard v. France Co., 263 Fed. 545 (C.C.A. 2) 18
Sandanger v. Carlisle Jacking Co., 192 P. 1005; 112 Wash. 480 74
States SS. Co. v. Berglann, 41 F. (2) 456 (C.C.A. 9th) 35
Tenneson v. Kadiak Fisheries, 2 P. (2) 745, 164 Wash. 380 58
The Osceola, 189 U. S. 158..... 12
The Iroquois, 194 U. S. 240 59
The Calvert, 51 F. (2) 494 (C.C.A. 4th) 37
The New Berne, 80 F. (2) 244 (C.C.A. 4th) 28
The Waco, 3 F. (2) 476 38
Warner v. Goltra, 293 U. S. 155 ..... 58, 25, 20
Zinnell v. U. S. Shipping Bd., 10 F. (2) 47 (C.C.A. 2d) 70

46 U.S.C.A. Sec. 688 (Jones Act) 58
45 U.S.C.A. 51-59 11
Sec. 20 of Act Mar. 4, 1915, 38 Stat. 1164 15

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To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The respondent respectfully submits the following brief upon the merits:

STATEMENT OF THE CASE

Aside from the detailed description given by Petitioner, most of the facts are fairly and accurately stated by the Supreme Court of Washington in the opinion (R 18 to 24). However, because of several inaccuracies in petitioner's statement of the case, and

because of their importance upon the questions involved, we feel that the following facts should be stated for a clearer understanding of the case:

The officers and crew of the Arizona were all Slavonians, except the engineer, who was an American, and all except the engineer spoke and used the Slavonian language in the prosecution of their work. The engineer, of course, neither spoke nor understood that language (R 197, 192, 242, 304, 243).

At several places the petitioners assert that the deceased was "an experiencéd winchman" and this is repeated several times in the brief in connection with the argument on the question of assumption of risk. This is done, no doubt, to convey the idea that Anelich was a "winch-driver" or "winch-operator", as those terms are generally understood. The truth of the matter is that Anelich had nothing whatsoever to do with the operation of the winch or the management of the clutch and controls. He was nothing more or less than a mere deck hand, whose only duty was to collect and coil the purse line as it was drawn onto the deck by the winch.

There is not a syllable of evidence in the record that Mr. Anelich knew of the worn condition of the clutch, or that he ever at any time had anything to do with the operation of the winch, or that he appreciated the danger, or that he at any time used the forked stick or

lock which held the clutch in mesh.

As stated by the lower courts, for the purpose of preventing this clutch from slipping out or becoming disengaged due to its worn condition, the defendants provided and constructed a lock, consisting of a piece of timber about 14 inches long forked at one end to fit over the handle in the elbow or bend thereof, while the other end was held in place by two cleats securely fastened to the winch timber; one cleat across the timber and one upright forming a square corner in which the end of the stick next to the bit or timber was placed, thus locking the handle in place and holding the clutch enmesh so that it could not slip out or be thrown out without removing the stick. (Pictures, Exs. A and F). Three expert witnesses testified that the clutch was so worn it would not stay enmesh without a stick or lock. (R. 107, 130, 85, 337). One of petitioner's witnesses testified it would slip without the stick (R. 298). There was therefore ample evidence from which the jury could find that this stick was in place at the time of the accident.

When the stick is in place, in order to stop the winch, without shutting off the engine, it is necessary to push the handle forward (toward the bow) about one inch, the thickness of the cleat, so as to free the stick from the square corner, and permit the removal of the fork-

ed end from the elbow of the clutch lever. Then the lever must be pushed aft a short distance to disengage the clutch.

It had the same effect as if one would place a grooved block of wood tightly, under the clutch pedal of an automobile.

At the trial it was respondent's contention that this clutch lever was a safety appliance to be used in an emergency such as existed when Anelich became tangled in the purse line, and that the forked stick, by means of which it was locked in place, entirely destroyed it as a safety appliance; and there was ample evidence from which the jury could have found this to be true. (R. 342, 347, 93, 96, 99, 104, 107).

At the time the deceased became entangled in the line, the purse lines were still pulling in the nets, and there was considerable weight on the winch and lines. (R. 189, 198, 313). The statements on pages 8 and 9 of petitioner's brief that the weight of the net was off of the line and that the engineer was warned by the shouts of Anelich (R. 313, 192, 198) are not correct. There was evidence from which the jury could find that the engineer was on deck (R. 68, 69, 74, 50, 300, 121, 339) and that the owner was standing within reach of the clutch lever at the time Anelich became entangled in the line (R. 86, 49, 85, 46). The jury

was also warranted in believing that the owner, who was within reach of the clutch lever, did not use it because it was locked, as aforesaid, and therefore directed the engineer to go below and stop the engine.

Anelich became injured in the following manner: a part of the purse line which he was collecting and coiling became entangled, and he jumped to one side to attempt to avoid it, but failed, and then his left leg got caught in the line, and it began to pull him toward the niggerhead or drum of the winch (R. 312). He exclaimed in the Slavonian language—"Oh, Mother of mine, my leg is caught" (R. 243, 308). The engineer not understanding the cries of the deceased, did not stop the engine until he was ordered to do so by the owner. However, before the engineer could go below and stop the engine Anelich was drawn into the drum of the winch where his leg was mangled and crushed, and the flesh, muscles and arteries were torn from six to eight inches, exposing the fragmented portions of the fibula and tibia (R. 153).

In order to release his leg it was necessary to chop the line from the niggerhead with an axe. Although there was a first aid kit aboard the vessel no effort whatsoever was made to use the same with a view to preventing infection (R. 273) nor did the defendants attempt to remove his trousers or underwear. All that

they did was to remove his boot, place a rope tourniquet around his leg over his clothing, above his knee, to prevent bleeding; they made no examination of his wound to ascertain the extent of his injury, and gave him no first aid treatment of any kind or character. (R. 83, 242). If sterile bandages and iodine, which were available, had been used any germs other than those which may have entered the wound at the time of the original injury would have been avoided (R. 155, 273), and those which entered the wound at the time may have been rendered innoxious.

Anelich was thereafter placed in a small skiff by the defendants and was later transferred to the purse seine fishing vessel, "Congress" (R. 82). The defendants sent no one from their vessel to look after or secure medical attention for Anelich. From that time on, he was in the care of persons upon whom there was no legal duty, to care for him. (R. 242).

Concerning the petitioner's negligence in delaying medical treatment of Anelich the petitioner's statement of the case and the statement of the Supreme Court of the State of Washington should be amplified upon as follows:

The XL II., the second boat to which he was transferred, proceeded to Mitchel Bay, a short distance away, where a fish buyer on board, left the boat, which

point was approximately 12 miles by road from Friday Harbor where Dr. Sturdevant and an ambulance were located.

The testimony showed that Dr. Sturdevant could have been in attendance upon the deceased within 20 minutes from the time he received a telephone call from Mitchel Bay (R. 266), and there was an ambulance subject to call by phone which could have reached the deceased within 25 to 30 minutes (R. 266). If the doctor had been called immediately the deceased's wounds would have been treated and the germs therein, *if any, in all probability, would* have been rendered innoxious within 45 minutes. (R. 157, 266)

Instead of taking the deceased off of the boat at Mitchell Bay, and securing a doctor at the earliest possible moment, the XL II continued on to Friday Harbor, a distance of about 15 miles from Mitchell Bay, and arrived there at about 10:30 or 11:00 o'clock in the morning, between 2 and 2½ hours after the injury was inflicted.

Dr. Sturdevant was called to the boat and immediately upon arrival cut the dirty trousers and underwear from the wound and put on a temporary dressing, *even though he knew that the man would be taken to his office within a period of ten minutes.* The deceased was then taken to Dr. Sturdevant's office a short

distance away and the wound was thereupon redressed and the deceased was given first aid treatment for the first time.

At the time the fish buyer left the boat at Mitchell Bay instead of calling the Coast Guard direct, he called the Fisherman's Packing Company in Everett and asked them to call the Coast Guard, informing them that there was a man at Friday Harbor with a "broken leg", stating nothing about the fact that the man's leg was practically torn off (R. 289).

Sometime later when Mr. Suljin of the Packing Co. at Everett talked with some one in Port Townsend, he merely said to tell the Coast Guard that "there is a man hurt" (R. 289) without stating that his leg was practically torn off. He then went to lunch without knowing when, if ever, the Coast Guard secured this call (R. 289). The record is not clear whether this call ever reached the Captain of the Coast Guard boat. The Coast Guard for some reason did not respond to this call, and Dr. Sturdevant, at about 2 o'clock in the afternoon, called them again to which call they responded and the deceased was picked up by the Coast Guard at Friday Harbor at about 5 P. M. that evening, and was taken to Seattle, Washington, where he was placed in the Marine Hospital at about 10:50

P. M. and given the usual preliminary treatment, including tetanus-antitoxin (R. 166). From where the deceased was injured, according to the United States Government Chart, it was 9½ miles to Victoria where there was a first class hospital and a doctor (Ex. 4). Even the slowest boat would have taken only about an hour to get to Victoria. An airplane could have been called and the deceased placed in a hospital in Seattle in about two hours (R. 178).

On the third day after arriving at the Marine Hospital the deceased developed septicemia (blood poisoning) (R. 154-156), from which he died on August 8th, 1933, (R. 157).

ARGUMENT

The petitioner's brief assigns four specifications of error, but it is apparent that there are only two major questions involved in this case:

1. Does a seaman, as a matter of law, in an action under the Jones Act, assume the risk of an unseaworthy vessel and defective appliances

   (a) When he continued to use the appliance with knowledge of the defect,

   (b) When, as in the case at bar, there is no evidence of the fact that he knew of the defect, or appreciated the danger, and the only plea of assumption of risk, upon

which there was no proof, was as to ordinary risks.

Or stated in another manner, with particular reference to the facts in this case, is the question of assumption of risk involved in a case where the only allegations and proof of negligence are those which, as a matter of law, constitute EXTRA ORDINARY RISKS (i.e., defective appliances and single unforseen act of negligence by the owner), and the only plea of assumption of risk, upon which there is no proof, is that the deceased was injured by "risks naturally incident to the decedent's employment".

2. Was there sufficient evidence from which the jury could find that the injury and resulting death was due to the negligence of the defendants?

I.

ASSUMPTION OF RISK BY SEAMEN

A. WHEN CONTINUING TO WORK WITH KNOWLEDGE

Under the facts in this case the question is squarely presented to the court as to whether or not the rights of seamen are to be measured by the equitable principles of the Maritime Law or by the strict rules of the common law.

The plaintiff in this case brought an action under

the Jones Act in the State Court before a Jury and petitioners contend that by doing so the seaman is to be treated the same as a railway employee and that his rights are to be determined under the decisions and principles laid down by the courts in construing the Federal Employer's Liability Act, 45 U. S. C. A 51-59, as applied to shore servants.

From the inception of the Admiralty Courts, seamen, due to the nature of their employment, and their inability to take care of themselves, have been considered Wards of the Admiralty. The decisions of this and other courts have fostered and liberally construed all statutes enacted for the protection of seamen.

It is the respondent's contention that seamen have never assumed the risk of an unseaworthy ship or defective appliances, even though they shipped, or continued to work, knowing of the defect. That it is a non-deligable duty of the ship owner to see that the ship is seaworthy and that the appliances appurtenant thereto are proper and safe.

One of the leading cases in this country is The Osceola, handed down by this court in 1902. Petitioners contend that this court did not pass upon nor consider the question of assumption of risk in that case. That this court did not intend to state the law in such broad

terms, and for that reason the defense of assumption of risk was impliedly considered as still being available to the owner of a vessel, even where the boat was unseaworthy or there were defective appliances.

THE OSCEOLA, 189 U. S. 158.

This was an action for damages by a seaman employed on a ship plying the Great Lakes. The plaintiff was injured by the negligence of the master in ordering the gangplank to be lowered into the wind just before the vessel docked. The wind caught the gangplank and blew it against the libellant and injured him. The court held that the ship was seaworthy, and that the injury was due to the negligence of the master, and that under the Maritime law, the libellant could not recover for the negligence of a fellow servant. It is not clear to what extent the question of assumption of risk was argued to the court, but we do know that it was at least in the court's mind, for in the portion of the opinion devoted to the briefs and arguments of counsel we find on page 162 the following:

> "Sound reason and natural justice requires only that the owner of the vessel shall be bound to use reasonable care to furnish a seaworthy vessel, sufficient and safe appliances, and sufficient and competent seamen and officers, and that the law of ASSUMPTION OF RISK SHOULD BE APPLIED TO THE SEAMEN".

The court then went into a detailed discussion of the history of various decisions and statutes throughout the world and the whole tenor of the decision is to the effect that owners of boats have always been liable to an indemnity where the boat is unseaworthy or there are defective appliances, regardless of any question of assumption of risk.

Throughout the decision we find such expressions as the following: (p. 173)

> "In The Ben Flint, 1 Abb. U. S. 126; S. C. 1 Biss 562, the claim to be cured at the expense of the ship is held to be applicable to seamen employed on the lakes and navigable rivers within the United States. See also *Brown v. Overton*, 1 Sprague, 462; *Croucher v. Oakman*, 3 Allen 185; *Brown v. The Brandish Johnson*, 1 Woods, 301.
>
> In The Edith Gooden 23 F. 43, the vessel was held liable in rem for personal injuries received from the neglect of the owner to furnish appliances adequat to the place and occasion where used. In other words FOR UNSEAWORTHINESS.
>
> This is readily distinguishable from the previous case of The City of Alexandira, 17 F. 390 and is in line with English and American authorities holding owners to be responsible to the seamen for the unseaworthiness of the ship and her APPLIANCES."

On page 170 the court said:

"In all of them (codes and decisions) there is a provision against liability in case of injuries re-

ceived by the sailor's wilfull misconduct."

This Court also made the following statement:

> "It will be observed in these cases that a departure has been made from the continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from UNSEAWORTHINESS. This departure originated in England .... and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."

On page 175 this court laid down certain rules of law which, it is our contention have, for years, had the force and effect of statutes when the rights of seamen are involved:

> "Upon a full review, however, of English and American authorities upon these questions, we think, the law may be considered as settled upon the following propositions:
>
> 1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> 2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the *unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship.*

In the third and fourth propositions the court held that the fellow servant doctrine applied in Admiralty and that the seaman could not recover for the negligence of the master or any member of the crew, which is just another way of stating that the seaman assumed the risk of the negligence of a fellow servant.

With such a well considered opinion, it is idle to contend that this court impliedly held that a seaman assumes such EXTRA ORDINARY risks as unseaworthiness and defective appliances. If such an important exception was intended this court would have expressly so stated.

Shortly after the decision in the Osceola the harshness of the fellow servant doctrine, as applied to seamen, was recognized by Congress and there was enacted Section 20 of Act to Promote the Welfare of American Seamen, approved March 4th, 1915, 38 Stat. 1164, which provided that "seamen having command shall not be held to be fellow-servants with those under their authority".

In *Chelentis v. Luckenbach SS Co.*, 247 U. S. 372 (1917) this court held that the act of 1915, which was aimed at the fellow servant doctrine, did not increase the damages beyond maintenance and cure.

The court, however, in handing down the decision in

the Chelentis case construed the effect of the holding in the Osceola case in the following language:

> "The contract of a seaman is maritime and has written into it those peculiar features of the maritime law that were considered in the case of The Osceola; and although, because of these peculiarities, such contracts are almost invariably litigated in Admiralty courts, still the contract must be the same in *every court*, maritime or common law. The only difference between a proceeding in one court or the other would be that the remedy would be regulated by the *lex fori* . . . . *So a seaman* bringing suit in a common law court for personal injuries could recover, even if guilty of contributory negligence, although a shore servant suing in the same court could not; and a seaman suing in a common law court for personal injuries could recover (except in the case of UNSEAWORTHINESS of the vessel or failure to give proper care and medical attention) only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter, whereas in a similar case a shore servant would be entitled to recover full indemnity."

Subsequent to the decision of this court in the Chelentis case and before the enactment of the Jones Act the C. C. A. of the Second Circuit had the question of assumption of risk, as applied to seaman, before it in the much cited case of

Cricket S. S. Co. v. Parry, 263 F (CCA2) 523, (1920), plaintiff was a seaman, winch driver. He went to work knowing that the wire rope on the winch was too heavy, and had steel core when it should have

been smaller with a hemp core. While he was operating the winch a loop of the wire rope fell on the drum of the starboard winch, as it was coming light from the hold, caught him around the body, jerked the lever out of his hand and threw him over the drum. His arm was so mangled that it had to be amputated.

The plaintiff sued contending that he was furnished with improper appliance with which to work. The defendant answered contending that he assumed the risk. The court gave judgment for the plaintiff and said:

> "The defendant contends that the plaintiff cannot recover because he shippepd with knowledge of the condition complained of, and because so far as the wire rope is concerned, proper rope could not be obtained. Two decisions of this court are cited in support of the first proposition. ****We do not think them applicable because the plaintiffs were shore servants, in the first a LONG-SHOREMAN AND IN THE SECOND A RAILROAD HAND. We are considering the rights of seamen, who have constituted from early times a peculiar class. The unusual protection extended to them is reflected in the familiar saying that they are wards of the admiralty. As to the second proposition, shipowners cannot justify furnishing them with defective and dangerous appliances on the ground that they knew it. ****The remarks by Mr. J. Brown in the Iroquois, 194 U. S. 240, ***are not to be understood as holding that defective and dangerous appliances are among the *ordinary* risks of the calling: ***The claim he was considering was *****for a sailor who had fallen from a loft in heavy weather.

> The injury was an accident pure and simple, necessarily attending the seamen's occupation. So far as the second proposition we think that vessel OWNERS WHO SAIL THEIR SHIPS WITH IMPROPER APPLIANCES WHEN THEY CANNOT GET PROPER ONES, DO SO AT THEIR OWN RISK, AND NOT AT THAT OF THE SEAMEN."

Note that this case goes so far as to hold that the seaman does not assume the risk even where the owner CANNOT get proper appliances.

And on the same day that court decided:

Storgard v. France & C Co., 263 F 545 (CCA2) 1920. In this case a seaman caught his fingers in an iron band that was attached to one of the sails, and as a result of an iron bolt being allowed to become worn he was injured. In deciding for the plaintiff the court said:

> "If the bolt was worn and defective, and the shipowners knew or ought to have known the fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen. * * * The seamen were bound to use the equipment and appliances which the owners furnished, and they were on their part bound to furnish and maintain equipment and appliances for the seamen to use, at least free from defects known or which ought to be known. *The common law rules do not apply to this relation of master and seaman. It is intimate and peculiar, and differs from that between shore mas-*

ter and servants. * * * Employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of shore servants."

Congress, with the rulings of these courts in the above cases fresh in its mind, in a determined attempt to protect seamen, and rid the law applicable to them of the only harsh rule then in existence (i.e. the fellow servant doctrine) enacted Section 33 of the Merchant Marine Act of 1920 (46 U.S.C.A. Sec. 688) also known as the Jones Act.

If prior to the Jones Act the rule of assumption of risk had applied to seamen injured by reason of the unseaworthiness of the ship, or defective appliances, certainly this Honorable count would have made reference to the matter at the time the above rule was proclaimed, and had there been any doubt in the mind of Congress as to the law, that there could be no assumption of risk, where there was unseaworthiness or improper appliances, an appropriate exception as to assumption of risk would have been inserted, similar to that applicable to Railway employees, where it was specifically provided, that there shall be no assumption of risk where there was a violation of a statute providing for a safety appliance. At the time the Jones Act was passed, the duty of a ship owner to furnish a seaworthy vessel and proper appliances, was as absolute

and as binding as if the same had been prescribed by statute, and it was not intended by the Jones Act to relieve the ship owner of this absolute duty to the seamen or to permit the owner to defend on the ground of assumption of risk, where his negligence resulted in unseaworthiness or defective or improper appliances.

This court through Mr. Justice Cordozo in the late case of *Warner v. Goltra*, 293, U.S. 155 clearly sets forth the reasons for the enactment of the Jones Act.

> "The purpose of the lawmakers, clear enough, we believe, upon the surface of the act, takes on an added clearness when the act is viewed in the setting of its history. Section 33 of the Merchant Marine Act of 1920 (46 U.S.C.A. Sec. 688) is derived from section 20 of the Act of 1915, 38 Stat. 1185 (46 U.S.C.A. Sec. 688 note). The parent section was aimed at the fellow-servant rule in its application to torts upon navigable waters. * * * The decision of this Court in the Chelentis Case gave warning that the change, if any, thus effected, did not avail to increase the damages beyond the cost of cure and maintenance. Thus warned, the lawmakers amended section 20 of the Act of 1915 by substituting section 33 of the Act of 1920. We cannot believe that in this process of amendment the word 'seamen' lost the broad meaning that it had in the law to be amended, and was narrowed by the exclusion of a particular species. * * *"

It is therefore clear what the law was prior to the enactment of the Jones Act, and what evils the act intended to correct. It is further clear that prior to the

Jones Act a seaman did not assume the risk of defective appliances or an unseaworthy ship even though he knew of the defect.

Every rule of reason and construction leads to the inevitable conclusion that the enactment of this act enlarged rather than restricted the rights of seamen.

The following cases are cited by respondent in support of her contention that under the Jones Act a seaman cannot assume and does not assume the risk due to unseaworthiness of the vessel, defective appliances or negligence of the owner or a fellow servant. Before the Jones Act the law disregarded negligence and awarded an indemnity; since the Jones Act the right to damages rests upon negligence.

The leading case under this Act is *Johnson vs. Panama Ry. Co.*, 264 U. S. 375.

The plaintiff was a seaman on the steamship "Alliance." The injury occurred while the vessel was afloat in the water of the Guanquil River in Equador, South America. The plaintiff was injured as a result of a defective ladder while he was climbing from the deck to the bridge, the most open and obvious place on a ship. The defense of assumption of risk was raised.

In this case the constitutionality of the Jones Act was involved and this Court was called upon to deter-

mine how much of the Emp. Liab. Act was contained in the Jones Act and at page 391 the court said:

> "The reference as is readily understood is to the Employers Liability Act of 1908, C. 149, 35 Stat. 65, and its amendments."

This Court approved the rule on the question of assumption of risk as laid down by the C.C.A. in this case, 289 Fed. 964, where the lower court in stating the rule at page 978, said:

> "Assumption of risk is the voluntary contract of an ordinarily prudent servant to take the chances of the known or obvious dangers of his employment and to relieve his master of liability thereof. * * * It should not be overlooked, that, where the use of the terms risk and acceptance of the risk are involved, the true question is whether, in incurring the particular risk in question, the plaintiff accepted the risk in the sense that by continuing at his work he agreed to relieve the defendant from the possible results. The plaintiff, consequently, not only must be shown to have KNOWN of the risk, but by implication from his conduct must be found to have voluntarily assumed it. * * * A risk must be voluntarily assumed to relieve the master of the liability."

On page 969 the Court said:

> "The Jones Act, however, *extends*, the seaman's right to recover damages for personal injuries, and applies in such cases the remedy given under the statutes of the U. S. to railway employees."

Again on page 980:

> "There is, however, no necessity for basing this decision on the doctrine that the plaintiff cannot be regarded as having voluntarily assumed the risk. The Maritime law imposed upon the ship owner the risk incident to the use of defective and dangerous APPLIANCES, and we see nothing IN THE NEW LEGISLATION WHICH CHANGES THE LAW IN THIS REGARD. The Fed. Emp. Liab. Act did not create the law. It simply recognizes it as it already existed, and restricted it in the classes of cases embraced in Sec. 4 of the act. What the law previously was is stated by this court in *Cricket SS. Co. vs. Parry* (C.C.A.) 263, F. 523, in which we held that a ship owner cannot avoid liability for injury to a seaman by a defective and dangerous appliance on the ground that the seaman knew of the defect, when he shipped. We declared in that case that, if a ship owner supplied a defective and dangerous appliance when a proper one could not be obtained, he did so at his own risk, and not at the risk of a seaman. There are cases in the other circuits holding the same doctrine (cases cited). The law as laid down in the above case is amply sufficient to justify the plaintiff's position that he did not assume the risk arising from the insufficient and dangerous apparatus which the ship owner furnished at its and not the plaintiff's risk."

The Circuit Court of Appeals again referring to the Judiciary Act of 1789, said:

> "The right of the common law courts was recognized and it was provided that the Federal District Court should have exclusive right of Admiralty and Maritime Jurisdiction saving to suitors in all cases the right of Common Law remedy

where the Common Law is competent to give it. The maritime law afforded two remedies. One was a proceeding in *rem*, and the other was a proceeding in *personam*. Where the proceeding was in *rem*, the jurisdiction of admiralty was exclusive; where it was in *personam* the courts of Common Law had a concurrent jurisdiction. And where a party came into the Common Law Court with a proceeding in *personam*, which he might have brought in the admiralty court, the cause was disposed of according to the procedure which governed that class of courts, and was tried WITH A JURY. It certainly cannot now be questioned that the act under which the plaintiff proceeded was in any respect invalid in providing that a seaman who suffers a personal injury in the course of his employment may not sue at law and have a right to a trial by jury. * * * The Jones Act extends the seaman's right to recover damages for personal injuries and applies in such cases the remedy given under the statute of U. S. to Ry. Employees."

And at page 974, the court quoted the language of this Court in the Ocela Case, 189 U. S. 158, setting forth the admiralty rules governing seamen.

The *Panama Ry. v. Johnson* case is cited and quoted from on page 23 of petitioner's brief but they do not mention the very strong language just quoted supporting our contention, nor do they state that this Court approved the language of this case, and stated that the law was correctly laid down by the lower court.

Supporting our contention that the Jones Act merely added to the rights of seamen, we find the following

within the petitioner's quotation:

> "The election is between alternatives accorded by MARITIME LAW AS MODIFIED and not between that law and some NON-MARITIME SYSTEM."

Shortly after the decision in the Panama case this court again further extended the rule in

International Stevedoring Co. v. Haverty 272 U. S. 50 (1926)

In holding that a stevedore was a seaman within the meaning of the act this court said:

> "It is true that for most purposes, as the word is commonly used, stevedores are not seamen. But words are flexible . . . The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business . . . In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century, we are of the opinion that a wider scope should be given to the words of the act, . . ."

In the latest case dealing with the Jones Act this court again enlarged the rights of seamen.

Warner v. Goltra, 293 U. S. 155.

The master of a tug boat met his death on the waters of the Ohio River, through the negligence of a pilot employed to navigate the tug. The personal represen-

tative brought an action under the Jones Act and the lower Court sustained a demurrer to the complaint on the ground that a "master" is not a seaman within the meaning of the Act. In construing the act this Court, through Justice Cardozo said:

> "In the enforcement of the statute a policy of liberal construction announced at the beginning has been steadily maintained. Early in the history of the act, the question came up whether it gave a remedy to stevedores. We decided that it did. 'It is true that for most purposes, as the word is commonly used. stevedores are not 'seamen'. *International Stevedoring Co. v. Haverty*, 272 U. S. 50, 52, 47 S. Ct. 19, 71 L. Ed. 157. None the less, verbal niceties were bent to the overmastering purpose of the act to give protection to workers injured upon ships. 'words', we said 'are flexible'. " * * *
>
> "In a broad sense, a seaman is a mariner of any degree, one who lives his life upon the sea. It is enough that what he does affects 'the operation and welfare of the ship when she is upon a voyage' ". * * *
>
> "Our concern is to define the meaning for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained. Congress knew that men employed upon a ship were without a remedy in damages for negligence beyond their cure and maintenance, *unless the injury was a consequence of the unseaworthiness of the ship or a defect in her equipment*" * * *
>
> "The old measure of recovery was the same for all aboard, the highest and the lowest. The new measure was not designed to narrow the protected

class while broadening the damages. We stick too closely to the letter if we say that Congress had the will to give damages for wounds or death to the crew at large or their dependents and to leave the master and his dependents out. An ancient evil was to be uprooted, and uprooted altogether. It was not to be left with fibers still clinging to the soil. * * *

"In respect of dealings of that order, the maritime law by inveterate tradition has made the ordinary seaman a member of a favored class. He is a 'ward of the admiralty', often ignorant and helpless, and so in need of protection *against himself* as well as others. * * *

This court in the very late case of *Cortes v. Baltimore Insular Line*, 297 U. S. 367, clearly adopted the rule that the standards of legal duty as to seamen and land servants are entirely different, when it said:

"We are warned, however, that in giving this contention to the statute (holding that failure to give medical attention is a personal injury) we are omitting to give head to its reference to the act regulating the remedies of railroad employees, and are ignoring the standards of duty thus carried over and adopted . . . True indeed it is that a common carrier by land is not subject to a duty, except in special circumstances, to give maintenance of cure to sick or disabled employees . . . *We do not read the act for the relief of seamen as expressing the will of Congress that only the same defaults imposing liability upon carriers by rail shall impose liability upon carriers by water. The conditions at sea differ widely from those on land, and the diversity of conditions breeds diversity of duties. This Court has said that 'the ancient char-*

acterization of seamen as wards of Admiralty is even 'more accurate now than it was formerly Robertson v. Baldwin, 165 U. S. 287. *...Another Court has said: "The masters authority is quite despotic and sometimes roughly exercised and the conveniences of a ship out upon the ocean are necessarily limited.' Scarff v. Metcalf,* 107 N. Y. 211, 215, 13 N. E. 796. *Out of this relation of dependence and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection.* Congress did not mean THAT THE STANDARDS OF LEGAL DUTY MUST BE THE SAME BY LAND AND SEA." (Italics ours)

Practically every point and contention raised by the petitioner in this case is answered, in accordance with our contentions, in a case just decided by the CCA of the 4th Circuit.

The New Berne, 80 F. (2) 244 (CCA 4th, Nov. 1935)

The deceased was a seaman on a regular run between Norfolk and Baltimore. He spent considerable time on the shore, making three trips a week. It appeared that for some time there was an auxiliary engine on the ship that was in such condition, due to the lack of a battery, that it had to be started by an open fire blow torch. When the main engine was stopped this auxiliary engine was used. On the night in question the main engine was stopped and the deceased stated that he was going to start the other engine. The

deceased had used the torch on numerous occasions. There was stored in the engine room certain gasoline tanks that were not properly vented so that the fumes from them could rise to the outside. Within a few minutes after the deceased went down to start the auxiliary engine, a fire broke out in the hold, and the deceased was burned to death. There was no direct evidence as to how the fire started, it was all circumstantial evidence to the effect that in attempting to use the open fire torch the fumes from the gasoline and oil in the engine room caught fire. The administratrix brought an action under the Jones Act and recovered a judgment. On appeal the following questions were raised:

1. Was the vessel unseaworthy.
2. Did the deceased assume the risk of the defective appliance, when he knew of the same and was fully aware of the condition.
3. That the doctrine of assumption of risk should apply the same as though the accident had happened on land.
4. That the deceased was not a seaman in the true sense of the act.

In holding that the deceased was a seaman and did not assume the risk the court said:

> "And we think that the judge below correctly held that decedent did not assume the risk arising from

the unseaworthy condition of the vessel; for the rule is well settled that a seaman does not assume the risk arising from the unseaworthy condition of the vessel on which he serves even if such condition be known to him when he embarks. *Scheffler v. Moran Towing & Transportation Co.* (C.C.A. 2d) 68 F. (2d) 11; *Ives v. United States* (C.C.A. 2d) 58 F. (2d) 201, 202; *Howarth v. United States Shipping Board Corporation* (C.C.A. 2d) 24 F. (2d) 374; *Panama R. Co. v. Johnson* (C.C.A. 2) 298 F. 964, 978-980, affirmed 264 U. S. 375, 44 S. Ct. 391, 68 L. Ed. 748; *Cricket S.S. Co. v. Parry* (C.C.A. 2d) 263 F. 523, 525.

Then follows the much quoted portion of the Cricket opinion to the effect that seamen are wards of Admiralty and owners who sail their ships with improper appliances do so at their own risk, and not at the risk of the seamen.

This case so clearly and forcefully answers practically all of petitioner's contentions that we will quote at length from the opinion:

"It is argued that where suit is brought under the Merchant Marine Act 1920, Sec. 33, 46 U.S.C.A. Sec. 688, to recover damages on account of the injury or death of a seaman, the defense of assumption of risk should be applied just as though the injury had occurred on land. This is not correct. It is true that the Merchant Marine Act provides that in actions on account of the injury or death of a seaman the "statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply.' But those statutes do not make

assumption of risk a defense. It was a defense at common law. They merely regulate the liability arising out of negligence, provide that contributory negligence shall diminish damages instead of barring recovery, and abolish the common law assumption of risk as applied to actions arising out of violations of the Safety Appliance Acts (45 U. S. C. A. Sec. 1 *et seq.*) 45 U.S.C.A. Sections 51, 53, 54. Assumption of risk is a defense, therefore, in an action for injury on land brought under the federal employers liability act, and not involving the safety appliance acts, because the defense existed at common law and is not affected by the statute. In an action under the Merchant Marine Act, assumption of risk is not a defense as applied to the unseaworthiness of the vessel, because it was not a defense prior to the enactment of the statute, and the statute has not created the defense. As said by Judge Rogers in *Panama R. Co. v. Johnson, supra*, 289 F. 964, at page 980:
'The maritime law imposed upon the shipowner the risk incident to the use of defective and dangerous appliances, and we see nothing in the new legislation which changes the law in this regard. The Federal Employers' Liability Act (45 U.S.C. A. Sections 51-59) did not create the law. It simply recognizes it as it already existed and restricted it in the classes of cases embraced in Section 4 of the act (45 U.S.C.A. Sec. 54)."

It is argued that as defendant was on a regular run in the Chesapeake Bay between Norfolk and Baltimore, making three trips a week and spending a large part of the time on shore, he does not come within the spirit of the rule which exempts seamen from assuming the risk of defective appliances and unseaworthy condition of vessels on which they serve. The contention is that his position was similar to that of a harbor worker or

longshoreman, and that he should be held to the same rule regarding assumption of risk as if he were working on shore, reliance being placed upon the decision in *Scheffer v. Moran Towing & Transportation Co., supra*, 68 F. (2d) 11. We are not impressed with this contention. Decedent was unquestionably a seaman, not a harbor worker or longshoreman, and his rights were governed by Maritime Law. Under the law, risk arising from unseaworthy condition of the vessel or defective appliances was not assumed; and we have no disposition even if we had the power, to import into the Maritime Law the common-law doctrine with respect to assuming the risk of the master's negligence. That doctrine had its origin under conditions very different from those which prevail today, and should be limited rather than extended. To say that the servant assumes the risk of the master's negligent failure to provide him safe and suitable appliances with which to work, because he does not exercise the theoretical freedom of choice to leave the employment, is little short of mockery of the economic necessity which requires him to work with any appliances which may be provided. *Instead of adopting the common law rule in Admiralty, the rule of Admiralty should be adopted by the common law, so that one whose negligent failure to provide safe appliances has resulted in injury to an employee should not be allowed to escape liability on the plea that the employee voluntarily assumed the risk of such negligence.*"

On the question of assumption of risk this case is squarely in point with the case at bar, and the reasoning of the court is so sound and commensurate with the spirit of the Jones Act that this court should be constrained to adopt the views therein stated.

On page 30 of petitioner's brief they quote at length from the case of *Southern Ry. Co. v. Hermans*, 44 F. (2) 366, decided by the 4th Circuit, in 1930. The New Berne case does not even mention the Hermans case for the reason that the risk of the tugs coming in contact with each other was held to be an ORDINARY RISK, known to the deck hand. This case further refused to follow the case of *Scheffler v. Moran Towing Company* 68 F. (2) 11, relied upon by petitioners.

The following well considered cases also hold strictly to the rule:

Grace & Co. vs. Skaanes, 4 Fed. (2d) 106 (C.C.A.) 1925.

This was a suit in Admiralty by a stevedore. The plaintiff was a winch tender on board the ship Santa Paula, which was discharging cargo in the Los Angeles Harbor. The winch was lifting heavy boilers from the hold when the wire cable running to the winch broke and injured him. The defendant pleaded assumption of risk. On appeal the C.C.A. for the 9th Circuit said:

> "We think there is no merit in this appeal. * * * We do not think we would be justified in interfering with those conclusions of fact by the trial court, nor in sustaining either of the contentions on behalf of the appellant that the appellee should be held to have assumed the risk resulting in his injury, * * *"

This man was not technically a seaman, and the court without further comment refused to hold that he assumed the risk of a defective applance.

In *Grimberg vs. Admiral Oriental S.S.*, 300 Fed. 619 (Wash.) the plaintiff, a seaman, was injured by tripping over an iron bar holding down a tarpaulin upon a hatch cover, which bar was negligently not fastened in place, in that one end of it extended beyond the hatch coaming, and projected over the passage across which plaintiff was in the act of going. The defendant pleaded assumption of risk and Judge Cushman in speaking of the effect of the Emp. Liab. Act as affecting the rule of assumption of risk said:

> "It therefore follows that an injured seaman must be held to have assumed the risk of injury from any and all those dangers ordinarily and naturally incident to the service in which he engages; but it cannot be that Congress intended to make applicable to seamen the entire doctrine of assumption of risk as the same has been developed under the law of railway carriers. This necessarily results from the difference in the terms of the two employments. The servant or employee on shore is free to quit at will his employments, if there appear to him dangers in it; this the seaman cannot do."

And after enumerating the obligations of a seaman to the ship and the penalties imposed upon him for disobedience said:

"The seaman does not assume the risk of injury resulting from the unseaworthiness of the vessel, defective appliances, or a place to work, not made reasonably safe, although with knowledge of the danger he continues in the employment." Citing the Crickett case.

In *States S.S. Co. vs. Berglann*, 41 F. (2) 456 (C. C.A. 9th), Berglann, a seaman, was injured while going from his quarters to the galley to get a bucket of water. Seas were running and while returning another servant was just ahead of him when Berglann saw a heavy sea about to break and yelled to the men ahead of him to hurry. The man ahead opened the steel door and escaped the sea. Berglann was too late but caught the inner hand hold of the door which was jammed against its casing by the force of the sea, thereby injuring Berglann's arm. Three grounds of negligence were charged. (1st) Failure to have a man rope or life line strung along the well deck. (2d) Negligent delay on the part of the seaman preceding plaintiff, blocking plaintiff's escape. (3rd) Permitting a skuttle door on top of the poop deck, which would afford plaintiff an alternative and safer way of entering the crews' quarters, to become out of repair, so that it had to be lashed shut, and could not be used to avoid danger. The plaintiff commenced an action at law under the Jones Act, and the defendant pleaded assumption of risk.

In passing upon this question the Court said:

"The chief question on this appeal is as to the assumption of risk of injury from these various conditions by his crossing the well deck as he did. Appellant contends that the risk assumed by plaintiff are to be measured by the rule recently declared by the Supreme Court in the *Del. L. & W. Ry. Co. vs. Koske*, 279 U. S. 7, as to railroad employees, namely, that the employee assumes 'when obvious or fully known and appreciated, * * * the extraordinary risk and those due to negligence of his employer and fellow employees'. However, that portion of Sec. 33 of the Merchant Marine Act * * * does not require the definition of assumption of risk by a seaman in the same terms used with reference to railway employees. The doctrine of assumption of risk has long been applied to the cases of seamen, its application has been made with reference to the peculiar nature of the seamen's employment and his subjection to orders and inability to abandon his employment during a voyage. There is nothing in the action above quoted, intimating that any change is to be made in this regard. *Panama Ry. Co. vs. Johnson*, 289 F. 964. In performing such tasks a seaman assumes all of the ordinary risk of his employment, but, because he cannot quit the ship nor control the actions or orders of the ship's officers, he does not assume the risk of negligent acts of those in charge of the ship whereby his place of work as a seaman is made unsafe, nor does he assume the risk of failure of those in charge of the ship to take such precautions as the perils of the sea may render necessary and reasonable. *The evidence as to the conditions actually existing was in conflict as to all three of the acts of negligence charged, and the court properly submitted all of them to the jury.* Finding no error. * * * The judgment is affirmed."

In *Henry Gillen's Sons Lighterage v. Fernald*, 294 F. 520 (C.C.A.), where a seaman was injured by a hole in the deck which he had known of for a week, and while the ship was at the dock, the court said:

> "The owner cannot delegate his duty to others. The principle is thus stated by Judge Ward in *Storgard vs. France* * * *; * * * 'The common law rules do not apply to this relation of master and seaman. It is intimate and peculiar, and differs from that between shore master and servants,—employers of seamen may not be insurers, but a much higher degree of care must be required of them than is required of employers of shore servants' * * * When plaintiff came aboard the lighter the day of the accident, it was the duty of the owner to see to it that the lighter was fit for the work intended, and, where such a defect has existed for a week or thereabout, it cannot be said that a boat is thus fit."

In The Calvert, 51 F. (2d) 494 (C.C.A. 4th) the court held that a master of the barge did not assume the risk of an unseaworthy condition arising by reason of a leak in the hull, even though he, knowing better than anyone else of the defect, continued to work.

In *Howarth v. U. S.* 24 F. (2d) 374 (C.C.A. 2) a messboy was injured due to the fact that a door on the passage did not have a latch so that it would stay open while he was carrying trays through it; the door slammed and caught his finger. It was held that the ship was unseaworthy, and that he did not assume the risk of a defective appliance.

Ives vs. U. S. 58 F. (2d) 201 (C.C.A. 2) 1932. A seaman was injured due to a ventilator being stuck. He and another seaman attempted to open it, with a pipe and the pipe slipped off and struck the plaintiff in the eye. It was held that the ship was unseaworthy and that the plaintiff did not assume the risk of defective appliances, even though he knew it.

Another well considered case holding that a seaman does not assume the risk of defective appliances is the *Waco*, 3 F. (2d) 476, where the court said:

> "A vessel must be in all respects *seaworthy* which is the EQUIVALENT TO THE COMMON LAW DUTY OF PROVIDING A SERVANT WITH A SAFE PLACE TO WORK. The Osceola, . . . "

See also *Dopico v. N. Y. Marine Co.*, 217 N. Y. S. 295 where the defense of assumption of risk was stricken on motion.

Petitioners have cited exerpts from a number of cases which have dealt with assumption of risk. In a very few have they given the facts, and upon a careful examination, in practically all of them, the court will state the general rule laid down in the Osceola case and then distinguish the facts in the case and really hold that what the seaman assumed was an ORDINARY RISK.

In the case at bar the evidence showed that the stick or lock which held the clutch in place was old and painted the same color as the rest of the boat; the evidence further showed that the worn condition of the clutch was something of long standing and that it would take several years of wear to place it in the condition it was at the time of the accident. Anelich had never been on this boat before, so it cannot be contended that he worked over a long period of time with the condition existing.

We have been unable to find a well considered case since the Jones Act, where the facts are at all comparable to the case at bar, in which the court held that the seaman assumed the risk of defective appliances.

The rule that a seaman does not assume the risk of defective appliances and an unseaworthy vessel is based upon sound judgment and experience. The rule should apply with double force at this time for it is very easy to make any and all necessary repaires to boats in this mechanical age. Fifty years ago a boat owner may have had difficulty securing certain appliances, but today such a mechanical device as a clutch can be shipped even across the country in a few days. With machine shops in even small towns, almost any mechanical device can be repaired or replaced in a few hours. It would not have taken over a day at a cost

of probably $40.00 to replace the clutch on the Arizona, and yet the owner, knowing of this condition, allowed the ship to go out to sea with one of the most important mechanical devices on a fishing boat in a defective condition. It is unreasonable to state that any seaman should assume the risk of any defective appliance, for he cannot drop his tools and walk off as shore servants can, it is easy for owners of boats to contend that a man should not work if he sees a defective appliance, but it is an economic necessity, that workmen hold their jobs, and especially so during the season of 1933 when Anelich was injured. There was then and is now a shortage of jobs, and it is our belief that there will always be a surplus of laboring people. The evidence showed that Anelich and his family, part of the time, was on the relief rolls. If this court adopts a rule that seamen assume the risk of such defects, it will enable ship owners to sail their ships with impunity; there will always be another man to take the injured man's place. As stated by the court in The New Berne case, it would be well for the common law courts to adopt the Admiralty rule, instead of the Admiralty courts adopting the common law rule.

We submit that the weight of authority in this country supports the doctrine that a seaman does not assume EXTRA ORDINARY RISKS, even though he

continued to work knowing of the defect.

On pages 41 and 42 of petitioner's brief they contend that the C. C. A. for New York, or the 2nd Circuit, has recently retracted from the strict rule laid down in numerous prior cases. They cite and rely upon:

Scheffler v. Moran Towing Co. 68 F. (2d) 11: Libellant was a cook on one of the respondent's harbor tugs. He had been engaged not only as cook but as deck hand if needed. On the morning in question the deck hand on the tug did not show up and libellant took his place, to handle the lines. After he had a number of lines fast, in going forward to make another line fast he carelessly got his leg in a bite of the port towing strap, which as the scow drifted back with the tide, caught and injured him. The trial court found the tug unseaworthy because it was shorthanded, and allowed the plaintiff to recover. The court makes the statement quoted on page 68 of appellant's brief, which should have ended with a comma, and then continues:

> "And assuming for the time being that the owner is liable even though nobody could possibly anticipate that the defect would cause the injury. This we can do because the libellant assumed the risk of the tug's short handedness. It is indeed true in general THAT A SEAMAN AT SEA DOES NOT ASSUME THE RISK OF ANY UNSEAWORTHINESS THOUGH IT BE KNOWN TO HIM WHEN HE EMBARKS," citing *Cricket vs. Parry, Panama vs. John,* Uinnell *vs. Shipping Board.*

Judge Monton, concurring, said:

> "Assuming the tug was unseaworthy because of the absence of the deck hand, this was not the proximate cause of the injury to the appellee. It was his own negligence which brought about his injury. I think the rule of assumption of risk has no application to the circumstances here, but I concur in the result."

In this case Judge Hand did not intend to reserve the question of whether or not a seaman assumed the risk of an unseaworthy condition or defective appliances, and this is clearly indicated by the language used and the cases cited in support thereof.

Petitioners further cite, in support of their contention that the 2nd Circuit has changed the rule:

Johnson v. U. S., 74 F. (2d) 703, 1935

Here a seaman elected to take a dangerous route over the well deck when he could have gone through the tunnel to the mess hall. The court held that the washing overboard by a wave was due to his negligence and not that of the master or owners. The court said:

> "A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation."

Both Judge Hand, who wrote the Scheffler opinion, and Judge Swan concurred in the opinion in the Johnson case and the opinion does not even cite *Cricket v. Parry* and numerous other cases from the 2nd Circuit holding that a seaman does not assume the risk of defective appliances. Certainly these judges did not attempt to overrule, without mentioning, numerous of their prior cases. We submit that the 2nd Circuit has not, in any sense retracted from its prior position.

Petitioners admit that a seaman does not assume the risk of defective appliances if he is under an order of any kind. It would be practically impossible for any court to accurately define what are and what are not orders, or what this or that individual would consider as an order. The master of a ship has absolute control and is often despotic; his orders are law on the ship. From a practical standpoint every seaman is under orders when he is doing the work which he was ordered to do. If the rule is laid down that a seaman assumes the risk of using defective appliances, except where he is under orders, it will leave open to ship owners an avenue of escape from liability that will be inequitable and unfair, and never intended by Congress when the Jones Act was enacted.

If such a rule is invoked it will undoubtedly be the duty of the seaman, or his heirs, to prove that he was

injured while acting under orders, before he can escape the general rule of assumption of risk. In a large majority of the cases the widows of seamen will be unable to produce any testimony to this effect. It might well be argued however, under the proof in this case that Anelich was under orders, for the master and owner were within a few feet of him directing his work. (R. 197) Who can say that Anelich did not understand that he was under orders.

B. WHEN THERE IS NO EVIDENCE OF KNOWLEDGE OF DEFECTS, AND THE ONLY PLEA IS ASSUMPTION OF ORDINARY RISKS.

The record can be searched with minute detail but there is not one scintilla of evidence that Mario Anelich knew of the worn condition of the clutch or that he ever at any time had anything to do with the operation of the winch, or that he appreciated the danger, or that he at any time ever used the stick or lock, which held the clutch in mesh.

This lever was on the opposite side of the winch from where Mr. Anelich was working and there is no evidence in the record that he ever used the lever or that he had seen it used by others. All of the evidence is to the effect that this winch was started and stopped by the engineer below.

It is respondent's contention that the clutch in question was installed, as, or was, capable of being used, in contemplation of emergency when the safety of the vessel or the crew required immediate stopping of the winch. That the possibility of its use for this purpose was knowingly and deliberately destroyed or removed by the owner of the vessel, when, because of the worn condition of the clutch, the master provided the stick which was in use at the time of the injury to Anelich.

Even if we assume (without admitting) that a seaman assumes those risks which he knew and appreciated, still under the facts in this case there can be no assumption of risk.

There would then be two branches of assumption of risk applicable here:

1st. That an employee assumes those risks that are naturally incident to the employment.

2nd. That even though the employer has been negligent in furnishing certain appliances still the employee assumes the risk of such negligence if he continues to work, being aware of and appreciating the danger.

The only plea relating to assumption of risks found in the petitioner's answer is that relating to "RISKS NATURALLY INCIDENT TO THE DECEASED'S EMPLOYMENT." (R. 10)

The burden was upon the defendants to prove their

defense of assumption of risk, and there was no proof whatsoever that Anelich was injured by ORDINARY OR NATURAL RISKS. There was a total failure of proof on this branch of the defense.

At the trial the plaintiff's case, with reference to the original injury, was rested upon two charges of negligence.

1st. The negligence of the owner of the vessel in furnishing defective appliances, (i.e. worn clutch).

2nd. A single unforeseen act of negligence on the part of the owner, personally, in failing to stop the winch and thereby save Anelich from injury.

The principal question at the trial was whether or not this clutch was so worn that it had to be and was locked in. Respondent introduced no evidence whatsoever that any of the ordinary risks mentioned by the petitioner caused the injury.

Petitioner is now asking this court to hold, as a matter of law, that the use of the worn clutch was assumed by Anelich, for the reason that it was an ordinary risk.

On the second branch of assumption of risk, if the petitioners intended to rely upon it, it was incumbent upon them to *plead* and *prove*, that the danger of the defective clutch, if any, was voluntarily assumed by

Anelich, by reason of the fact that he was aware of and appreciated the danger. Even conceding the fact that such testimony would have been admissible, there was no evidence whatsoever to substantiate this defense.

Petitioners in a futile attempt to find such evidence, on page 51 of their brief, state that Anelich was working near the stick and he must have used it and must have known of the defective condition of the clutch. In other words, petitioner is asking this court to hold as a matter of law that Anelich knew of the condition of the clutch and that he used the stick. The burden was upon the petitioners to *prove* these facts. There were eight or nine members of the crew who had been on the boat with Anelich during the season, and each of these men testified at the trial. It is practically certain that if Anelich knew about the worn condition of this clutch, or had used the stick, these witnesses would have so testified.

In *Chesapeake & O. Ry. v. Winder*, 23 F. (2d) 794 (C.C.A. 4) a railway employee's case, the court said:

> "As to the assumption of risk . . . the burden of proving that plaintiff had assumed the risk is upon the defendant, and in order to justify a directed verdict for the defendant on that ground the evidence tending to show such assumption must be clear and uncontradicted."

In another railway case this court in *C. & O. Ry. v. Proffitt*, 241 U. S. 462, said:

> "But if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence . . . . . *The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment*, but which result from the employer's negligence."

In *O'Brien vs. Lucken[illegible]cn SS. Co.*, 293 Fed. 170 at 179, the deceased was a CARPENTER working on a ship at the dock. The Court said:

> "In the instant case the deceased was exposed to a danger not normally incident to his employment. The danger was occasioned by the negligence of his employer in allowing the timbers to be placed upon the hatch, and in not having the hatch properly secured. The decedent had a right to assume that his employer had seen to it that the hatch was properly secured, and was reasonably safe. He is not to be treated as assuming the risk of its insecurity, until HE BECOMES AWARE OF IT AND IT HAS NOT BEEN SATISFACTORILY SHOWN THAT HE WAS AWARE THAT IT WAS INSECURE. He was under no obligation to ascertain whether it had been secured and could be stepped on in safety."

In the case at bar there was no duty upon the deceased to examine the clutch and there is no evidence that he was aware of the defective condition of it, and therefore he could not assume the risk.

With this condition of the record the petitioners requested instruction No. 7 (R. 12) on the question of assumption of risk.

This instruction was properly refused because there was no evidence from which the jury could have found that Anelich knew of the worn condition of the clutch, and even if he had known, under the Maritime law he could not be held to have assumed the risk of a defective appliance, that clearly rendered the vessel unseaworthy.

This instruction would have confused, rather than aided the jury as it would have misled the jury into believing that under the law, as defined in the instruction, a defective appliance and/or an unseaworthy vessel, and the negligence of the owner in failing to shut off the winch, were all ordinary risks incident to the employment, and assumed by Anelich. The instruction failed to define an ordinary risk and the difference between that and an extra-ordinary risk.

Petitioners also contend that the seaman assumed the risk of delayed medical treatment. There was no pleading or offered instruction on the question of assumption of risk of delayed medical attention, and all of the evidence offered by both sides was submitted to the jury.

Under the practice in Washington it was the duty of the petitioner to submit proper instructions, under the law and facts, and it is not the duty of the court to segragate the correct from the incorrect. If an instruction is partly correct and partly incorrect, the court can, without error, refuse the whole instruction.

In *Fehler v. Montesano*, 188 p. 5, 110 Wash. 143, the Supreme Court of Washington, citing a long line of cases, laid down the rule:

> "By several announcements of this court, the law is fixed that it is not error to refuse to instruct the jury as requested when the instruction is partially erroneous; that is, there is no obligation upon the court to segregate the correct and incorrect portions of a requested instruction and then submit the correct portion to the jury."

See also *Hansen v. Sandvik*, 128 Wash. 60 to the same effect.

In discussing the assumption of risk of causes of the original injury, the petitioners contend that Anelich was merely a shore worker, and could get away from the ship in a short time, but when they come to the assumption of risk of delayed medical attention they contend that Anelich was a seaman in the strictest sense, and that he assumed the risk of the owners taking whatever time was necessary to get him to a doctor and hospital.

It is clear from the record in this case that even though this court holds that a seaman assumes the risk of defective appliances, when known to him, that under the facts in the case at bar the judgment of the lower court should be affirmed.

It is true that the Supreme Court of Washington stated that the trial court declined to submit the defense of assumption of risk to the jury, but what the court really held and meant to state was that under the law and facts in this case the defense of assumption of risk was not an issue to be submitted to the jury.

II.

SUFFICIENCY OF THE EVIDENCE

A. Of Negligence Causing Original Injury

Assignments of error 2, 3, and 4 all present the single question of whether or not there was sufficient evidence from which the jury could find that the injury and resulting death was due to the negligence of the defendants.

In considering these assignments the court must keep in mind the fact that the respondent is a widow of the deceased seaman; that she was unable to secure even one witness, from the members of the crew, who would testify in her behalf. She was compelled to prove her

entire case from the testimony of hostile, adverse and interested witnesses.

Petitioners are, in effect, challenging the sufficiency of the evidence.

In *Gunning v. Cooley*, 281 U. S. 90, where there was a question as to whether or not the plaintiff had proven negligence of a doctor in treating the plaintiff's ear, this court said:

> "Issues that depend on the credibility of witnesses, and the effect or weight of evidence are to be decided by the jury. And in determining a motion of either party for a preemptory instruction, the Court assumes that the evidence for the opposing party proves all that it reasonably may be found sufficient to establish and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deductible from them. (cases cited) Where uncertainty as to the existence of negligence arises from a conflict in the testimony . . . the question is not one of law but of fact to be settled by the jury."

There was ample evidence from which the jury was warranted in believing (1) that the clutch was so worn and defective that it would not stay in mesh without the aid of the stick or lock, and (2) that the owner of the boat was standing within reach of the clutch lever, when Anelich became entangled in the line, and (if the clutch had not been locked) he could easily have disengaged the clutch, but negligently failed to do so.

With reference to the condition of the clutch Mr. Hurd testified: (R. 107)

"Q. In your opinion, Mr. Hurd, would that clutch stay enmeshed with a three ton load on it if this stick was not used, or some other method of holding it?

A. Well, it might if it was standing still, but you couldn't start it; it wouldn't turn only one or two turns before it would work out of place.

Mr. Lincoln testified: (R. 130)

"Q. In your opinion, Mr. Lincoln, would that clutch without some assistance from some other source stay enmeshed when the load is applied?

A. I don't think—it may on occasions, but it would be too great a risk.

Q. And why wouldn't it stay in, if it would not?

A. Because of it's worn it will climb out."

Mr. Bolstad testified: (R. 337)

"Q. Now, in your operation as a fisherman have you ever seen a block used as you found on the 'Arizona' yesterday?

A. Well, very seldom. I have seen a little wire on it just temporary to hold it until they could get into port and get the jaw clutch fixed. A thing like this is nothing but just a trap, that's all. * * *

A. Well, for one thing, this drive clutch here, the jaws are chipped off. It tapers so when she is driving it has a tendency to spring apart. The drive side of this jaw is chipped off. On one side it is a quarter of an inch and tapers

down to three-quarters instead of a full inch and a half, and on the other side it is three-quarters instead of a full inch and a half."

See also Mr. Brajich's testimony to the same effect. (R. 299)

The testimony to the effect that Mr. Antone Mardesich, the owner of the boat was within a few feet of the clutch lever is as follows: (R. 86)

"Q. Let's have your mark on this model here just where you were standing, on which side of this, at the time Mr. Anelich was hurt.

A. I was standing, let's see,—I was standing on this side here. (indicating)

A. Well, mark an "M",

A. Approximately in there. (indicating)

Q. On the starboard side just forward of the winch and near the after starboard side of the house.

Q. How much distance is there between where you were standing and where Mr. Anelich was standing.

A. It's about eight or ten feet, . . ."

See also pages 46 and 49 of the record, which show the same position.

An examination of the exhibits (Model of Boat) will show that the winch handle was within a few feet of the spot where the owner of the boat says he was standing at the time Anelich exclaimed that he was caught.

If the stick or lock was not in place he was clearly negligent in not disengaging it, however, the jury had a right to believe that the clutch was so worn that it would not stay in place and that it was locked in at the time Anelich was hurt. As stated by the Supreme Court of Washington, "we think, however, that there was sufficient circumstantial evidence for the jury to find that it was (being used)."

The engineer testified as follows: (R. 191)

"Q. Tell us what you actually did.

A. When they hollered I reached over and pulled the main clutch out to stop the winches. That is the main clutch. (R. 192)

Q. And do you say he was suffering a great deal?

A. Yes, sir, he was. You see, I don't understand their language at all, and they were talking in their own native tongue, and I figured the best thing to do was to get out of there, because they could understand each other and I would be in the road, and I stayed away."

There was considerable direct testimony from which the jury could have believed that the engineer was actually on deck at the time Anelich hollered, and thus the winch could not be stopped until he was able to go down to the engine room. (R. 68, 69, 74, 121, 50, 300, 339)

The following acts of negligence were clearly proven:

(a) Defective appliances; worn clutch and lock thereon.

(b) Failure of the owner personally and members of the crew to disengage the clutch in time to avoid injury.

(c) Failure of the owner and crew to render first aid at the time of accident.

(d) Having an engineer who did not understand the Slavonian language, and delay by the engineer in stopping the engine.

(e) Failure to send any member of the crew with the injured man.

(f) Failure to put into nearest port, and in not adopting fastest available mode of travel to medical aid.

(g) In telling Coast Guard that there was 'a man hurt' instead of stating that his leg was practically torn off."

In the light of this evidence the courts below did not err in holding, as a matter of law, that Anelich did not assume the risk,

(a) of defective appliances, rendering the boat unseaworthy;

(b) of a single unforseen act of negligence on the part of the owner, in failing to stop the winch.

Hansen v. U. S. 12 F. (2d) 321 (So. D. Ga. 1926)

In this case the plaintiff was a seaman on board the ship Coldwater in the harbor at Charleston, S. C. The injury to the plaintiff was caused by his being caught in a cable, which was wound around a winch and cut

off his leg. The plaintiff commenced an action in Admiralty under the Jones Act alleging that the winch was dangerous, defective, unseaworthy and unsafe; that the defendant was negligent in standing by the winch and seeing the plaintiff injured when two steps could have been taken by another seaman and the winch shut off, and in waiting while other seamen climbed down the engine room to cut off the steam at the boiler.

In the opinion the court quotes in full the rules laid down in the Osceola, 189 U. S. 158, which applied before the Jones Act. The Court then said:

> "The Circuit Court of Appeals of the Second Circuit in the case of *Allianca, Panama R. Co. vs. Johnson*, 298 Fed. 964, and the SUPREME COURT OF THE U. S. in the same case, 264 U. S. 375, held that the said Merchant Marine Act of 1920 made applicable to seamen, whether the suit be brought at common law or in Admiralty, the provisions of the Fed. Emp. Liab. Act and its amendments. The Emp. Liab. Act. provides: (act quoted)
>
> The doctrine of the assumption of risk has not been altered and while a recovery cannot be defeated by contributory negligence, the doctrine of comparative negligence with resulting diminution in the amount of recovery is applicable.
>
> This case must therefore be determined under the provisions of the Merchant Marine Act.
>
> A review of the evidence is unnecessary. A decree * * * in favor of libellant of $5,000."

In that the facts in the above case are almost identical with those in the case at bar, it holds the owner guilty of negligence in not shutting off the winch.

See also:

Chicago R. I. Co. v. Ward, 252 U. S. 19;

Reed v. Director of Railways, 258 U. S. 92;

Ranstrom v. International Stevedoring Co., 277 p. 922, 152 Wash. 332;.

Tenneson v. Kadiak Fisheries, 2 P. (2d) 745, 164 164 Wash. 380.

The Jones Act expressly provides that a seaman does not assume the risk of a single act of negligence on the part of a fellow servant. He certainly would not assume the risk of the owner's personal negligence.

Warner v. Goltra, 293 U. S. 155;

46 U. S. C. A. Sec. 688;

Rasmussen v. Twin Harbor Co., 265 P. 1085, 147 Wash. 260.

Clearly there was ample evidence from which the jury could find that the original injury was due to the negligence of the defendants and as stated by this court in *Gunning v. Cooley, supra,*

> "Where uncertainty as to the existence of negligence arises from a conflict in the testimony, the question is *not one of law* but of fact to be settled by the jury."

B. AS TO PETITIONERS' NEGLIGENCE IN RENDERING MEDICAL CARE AND ATTENTION.

Petitioners admit that on the question of whether or not prompt and adequate medical attention has been rendered, each case must stand upon its own facts. The *Iroquois*, 194 U. S. 240. This being true, if there is any evidence of negligence whatsoever, it becomes a question for the jury.

The Supreme Court of Washington so clearly and forcefully answered these contentions in the last three pages of the opinion that we again desire to call the court's attention to this portion of the opinion (R. 22, 23, 24)

The evidence is not in dispute and clearly shows that by the exercise of ordinary and reasonable care and diligence, the defendants could have procured, at little or no expense, the services of Dr. Sturdevant within less than an hour from the time Mr. Anelich was injured. They could have been in Victoria, 9½ miles away, within an hour, where there was a first class hospital and doctor.

The character of his wound was of such a nature that the ordinary layman, had they taken the trouble to pull up his trousers and look at it, would have been

impressed with the imperative need of immediate medical attention, and the record shows, from the tesimony of the defendant's own witnesses, that within less than fifteen minutes they transferred the deceased to another vessel and thereafter gave him no care, attention or concern whatsoever.

As we view petitioner's contention this is admitted; and they now contend that under the circumstances they performed their full legal duty under the facts in this case.

Mr. Makovich was at the telephone a very few minutes after the accident but he did not call the doctor and he did not call the Coast Guard. He did, however, communicate with the Fishermen's Packing Company in Everett with the request that they get in touch with the Coast Guard and send them to Friday Harbor to pick up a man with a "broken leg." The record is not clear as to whether the captain of the Coast Guard boat ever got the message sent by the Fisherman's Packing Company. They did not even use their first aid kit and their excuse for not using it is based upon the fact that this was a broken leg and that they did not think a first aid kit would cure a broken leg. The master testified:

"Q. Now did you use the first aid kit on Mr. Anelich?

A. No.

Q. Why didn't you?

A. I didn't think a first aid kit would cure a broken leg. (R. 241)

Q. And what did you do for him if anything?

A. We didn't do anything. We transferred him from the Arizona to the Congress right away." (R. 242)

Antone Mardesich, owner of the vessel abandoned Mr. Anelich right at the time he was injured and went into the cabin of the vessel and laid down (R. 83). And Peter Mardesich, the master, went away to the bridge as he says, "to call help." And neither of them took the trouble to ascertain the extent of Mr. Anelich's injuries.

Antone Mardesich testified: (R. 83)

"Q. Why did you want to get him there quickly?

A. Because we know that he got some broken bones in there, and we couldn't fix it up for him, and we wanted to get him to the doctor right now; we aren't doctors; we are fishermen; we couldn't fix anything, you know. And if he is hurt, or anything like that, we can put some *iodine* on it, but when it is broken, or anything like that, we can't fix that up."

Q. Did you bandage it up?

A. No, we just put that rope on it so he wouldn't bleed, because *he was bleeding so*, and they seen more than I did because I was sick and excited, and I had to go to the pilot house and get me some digilatis for my heart and I laid there for a while until I got through with it."

Further bearing on the question of proper medical attention, and the casual connection between the original injury and the death the evidence showed: Dr. Teufel (R. 161-162)

"Q. And there is no first-aid treatment that would prevent that, (germs from entering), is there, Doctor, by a layman, that you know of?

A. Well, the use of ordinary preventive measures such as antiseptics and putting aspetic dressings on the would would minimize the possibility I would say.

Q. (Mr. Pierce): Well, assuming that the man's clothes and underwear had been ground into the flesh and that the flesh was bruised, it would be a dangerous situation for a layman to endeavor to clean up, would it not?

A. Well, I don't think that; a layman would probably be limited to swabbing the thing with an antispectic solution, applying a sterile dressing, and possibly placing him in the care of a hospital or physician so no further injury could occur to it.

Q. Blood poisoning and speticemia is not unusual, is it, even where hospitalization takes place shortly after the accident occurs?

A. You say usual?

Q. Well, is it not unusual?

A. Well, I would say that less cases develop. I would say the majority of cases do not develop the septicemia.

Q. The majority of cases?

A. Do not.

Q. And that, regardless of the time they are hospitalized?

A. Yes, I would think so. The mere fact that there are so many people living on the earth is proof of that.

Q. But it is impossible for you to tell from the observations that you made of this man, when this bacteria or poison was introduced or got into his system?

A. I am not able to say positively, but I've got an opinion.

Q. And it may have gotten in at the very instant or within a comparatively short time after the accident occurred?

A. Yes. * * *

A. Am I supposed to give an opinion?

Q. Yes.

A. Well, I would say that a man who had medical treatment naturally would run less chance of having infection than if there were delay in his treatment.

In the case at bar, there was sufficient evidence to warrant the jury in finding that the neglect to give him care and treatment contributed to his injury, pain, suffering and death.

See also similar testimony of Dr. Laige (R. 165) and of Dr. Sturdevant. (R. 266)

From the testimony it is obvious that petitioners are not stating the facts when they state, on page 71 of

their brief, that all four doctors testified that the germs causing death entered the wound at the time of the original injury.

Numerous complaints are made of the Court's ruling in admitting testimony as to pain and suffering; negligence in the delay in getting him to the doctor; and the evidence pertaining to the petitioner's alleged negligence in not calling an airplane, which would have taken only two hours; all of which, we believe, were questions of fact for the jury to determine. The evidence offered and received was not objectionable, in that it was proper to show the facts so that the jury might weigh and consider such evidence, and that all objections made thereto were in the nature of challenges to the weight of the testimony rather than to its admissibility. Such testimony was proper for the jury to consider in determining whether or not it contributed to the deceased's *pain and suffering* which was an independent item of damage properly recoverable in this action.

Petitioners further contend and strongly urge that all of this testimony pertaining to the alleged negligence in caring for the deceased and his injuries, was improper and should have been excluded on the theory that the evidence did not establish any causal connection between the failure to give the deceased proper

medical attention and his death. They cite the case of *Cortes vs. Baltimore Insular Line*, 66 Fed. (2d) 526, and at page 73 of petitioner's brief they say:

> "The Circuit Court of Appeals of the 2nd Circuit 66 Fed. (2d) 526, (1933) denied recovery, as follows:"

and then they quote at length various excerpts from the decision of the Circuit Court of Appeals in the *Cortes* case as supporting their contention that the Court denied recovery, while as a matter of fact the Court did not deny recovery.

The history of the *Cortes* case, in the various courts, is extremely interesting on the subject here under discussion. A recovery was allowed in the trial Court from which an appeal was taken to the Circuit Court of Appeals.

The Circuit Court of Appeals 52 F. (2) 22, held that failure to give medical attention to a seaman is *not* personal injury under the Jones Act. This Court, 287 U. S. 367, speaking through Mr. Justice Cordoza, held that failure to give medical attention was a personal injury within the meaning of the Jones Act, and remanded the case to the C.C.A. for the reason that the Court had assumed, without deciding, that the care of the seaman had been negligent and that there was a causal connection between the negligence and the

death; correctness of that assumption had been challenged by the ship owner; these issues of fact being still open and undecided the cause was reversed and remanded so that the C.C.A. could dispose of these issues.

In the second opinion in the C.C.A., 66 Fed. (2d) 526 at 528, the Court held that under the record as it then existed, it could not be determined what kind of pneumonia the deceased died from, and therefore it could not be determined whether or not there was a causal connection between the failure to give the seaman medical attention and that of his death. The cause was remanded for a new trial and taking of further testimony.

In the second trial of this case, 6 Fed. Supp. 604, the sufficiency of the evidence was again challenged on the ground of the lack of causal connection between the lack of care and death, the court reserved decision and submitted the case to the jury, and there was a verdict for the plaintiff. The court then passed upon the sufficiency of the testimony and in doing so reviewed the decision of the C.C.A. reported in 66 Fed. (2) 526, and said:

"Had the medical testimony presented at the second trial been identical with that at the first, I should feel compelled to accept the foregoing as an expression on the part of the C.C.A. that causal connection between the negligence of the defendant and the seaman's death had not been sufficiently established to support the jury finding of causal connection. The testimony did in my opinion, sufficiently vary on the occasion of the second trial to to justify its reconsideration *denovo*."

"True, there was no positive testimony and obviously from the circumstances of the case none could be presented establishing, with certainty, the type of pneumonia from which the seaman died. There was, however, some testimony, apart from the matter of percentages of occurrance of the several types, which would justify the jury in concluding with reasonable probability that it was not the most dangerous Friedlander type. I am mindful that even if we accept the premise that the jury was justified from the evidence in that finding, still it is clear that no doctor could testify and no jury could find, with certainty, that had the most skillful treatment been available the seaman would have lived. It can only be said that had the ship's officers given to Santiago considerate and reasonable care within their limited knowledge and power to act, or had themselves, or with the assistance of the Coast Guard, put the patient ashore for hospitalization at a point en route instead of keeping him on board until their return to N. Y., his chance of recovery, would have been substantially greater. It is obvious that in a trial of most issues between litigants more conclusive and satisfactory proof of causal connection than this would be required. The law must, however, to do justice between parties, recognize different degrees and standards of proof varied somewhat

by the character, possibilities, and circumstances of the cause involved. Where one is fatally injured, no one with certainty can know what the individual's life's span would have been, but the law recognized that the larger measure of justice is accomplished by assuming that the deceased had the average expectancy as established by the mortality tables. So we here do not know that the seaman would have lived had the defendant's negligence not intervened. We know only that from usual experience the wrongful act of the defendant substantially lessened his chance. Inconclusive and unsatisfactory as this kind of proof may be, there intrudes upon our consideration the query in a case of this character: Is not greater justice done by resting the burden of that uncertainty upon the wrongdoer, rather than the one wronged? My own mind is drawn to that view."

"In this case when before the Supreme Court on the question of the right to sue under the Jones Act, that court * * * said: '* * * This court has held that the act is to be liberally construed in aid of its beneficient purpose to give protection to the seaman and to those dependent on his earnings. * * * Congress did not mean that the standards of legal duty must be *the same by land and sea.* Congress meant no more than this, that the duty must be legal, i.e., imposed by law; that it shall have been imposed for the benefit of the seaman and for the promotion of his health or safety * * *."

"If in this case we accept as established the fact of negligent conduct of the defendant and deny recovery on the ground of insufficient proof of causal connection with death, there will be left open a class of cases under a statute intended for the protection of the health and safety of seamen where neglect of duty can be admitted with impunity. The spirit of our jurisprudence, while

> fostering conclusiveness and certainty, does not look with favor upon nurturing wrong doing and denying a remedy. The nearest approximation to reasonable justice in this case necessitates the denial of the motion to dismiss."

In discussing this very question Justice Cardozo said:

> "Let us suppose the case of a seaman slightly wounded through his own fault, but suffering grievous hurt thereafter as a consequence of Septic poisoning brought about by lack of treatment. The common speech of man would give a like description to the wrong that he has suffered. The failure to provide maintenance or cure may be a personal injury, or something else according to the consequences. * * * If the default of the vessel and its officers has impaired his bodily or mental health the damage to mind or body is none the less a personal injury, because he may be free at his election to plead it in a different count." Cases cited. "Nor is liability escaped by appeal to the distinction between acts of ommission on the one hand and those of commission on the other."

This Court can well appreciate the vast distinction between the *Cortes* case (a seaman suffering from pneumonia) and the case at bar, where the original injuries were caused by the petitioner's negligence and the physical injuries were so apparent and so serious that the defendants were unable to witness his suffering, became ill, and left him to be transferred in the skiff of the Congress to that vessel and thereupon abandoned him.

In *Zinnell vs. U. S. Shipping Board*, 10 F. (2) 47 (C.C.A. 2) (1925), the appellant argued that no one could tell whether the deceased was drowned or killed as a result of the negligence in not having the guard rope in place. On this question the court said:

> "Nobody could, in the nature of things, be sure that the intestate would have seized the rope, or, if he had not, that it would have stopped his body. But we are not dealing with a criminal case, nor are we justified, where certainty is impossible, in insisting upon it."

So in the case at bar we cannot secure evidence which will demonstrate that the failure to give this or that treatment at this or that particular time was beyond a reasonable doubt, the thing that caused the death.

In *Langness v. Green*, 282 U. S. 532, 32 F. (2d) 284 this court held that the question of what caused the injury was for the jury.

At page 70 of petitioner's brief in discussing the question of proximate cause of the death, they said:

> "This phase of the case is entirely removed from the first two specifications of error, and the question of liability for the original injury is not involved."

The duty to provide care is admitted and we do not think that petitioners can divorce their negligence in failing to give him proper care from the resultant death on the theory that their duty was the same re-

gardless of how his original injuries occurred.

In substance as we understand it, petitioner's contention is that their neglect to give him medical care is immaterial and should not be considered because the evidence shows that in all probability the septecemia germs got into the wound at the time of the original injury and it has not been shown that any medical attention would have prevented his death.

In other words, even though they admit their negligence in causing the original injury, they are not liable unless the respondent proves that he could not have died from any cause other than their failure to provide proper medical attention.

It is respondent's contention that unless petitioners can exculpate themselves from blame for the original injury they cannot be heard to say, that their neglect to furnish medical care did not contribute to the pain, suffering and death of the deceased.

Having set in motion through their neglect an egency of harm they are liable for all damages proximately resulting therefrom, and it is immaterial whether the act was one of commission or omission.

This court should not require the widow and children to produce evidence that demonstates *conclusively* a casual connection between the negligence disclosed by

the physical facts and circumstances and the death, when the only evidence which she can produce to explain these physical facts and their relation to the injury must come from the reluctant lips of the defendants and their employees. The rule contended for by appellant would amount to a denial of justice, and the Supreme Court of Washington so held in *Frescoln v. Puget Sound T. Co.* 188 P. 5; 90 Wash. 59 at 64, where is said, quoting from the Court's decision from *St. Germain vs. Potlatch Lumber Co.*, 76 Wash. 102:

> "The court held the circumstances tending to show a soft roadway, and loose mortise joints in the pilot of the engine, sufficient to carry the case to the jury. The court said: 'A plaintiff in this character of case is not obligated to establish the material facts essential to a recovery beyond a reasonable doubt. Such a rule would amount to a denial of justice. It is sufficient if his evidence affords room for men of reasonable minds to conclude that there is a greater probability that the accident causing the injury happened in such a way as to fix liability upon the person charged with such liability, than it is that it happened in a way for which the person so charged would not be liable. 'There are very few things in human affairs, and especially in litigation involving damages, that can be established to such absolute certainty as to exclude the possibility, or even some probability, that another cause or reason may have been the true cause or reason for the damage, rather than the one alleged by the plaintiff. But such possibility, or even probability, is not to be allowed to defeat the right of recovery, where the plaintiff has presented to the jury sufficient facts and circumstances surrounding the occurrence as

to justify a reasonable juror in concluding that the thing charged was the prime and moving cause.' In other words, the plaintiff is only required to satisfy the jury, by a fair preponderance of the evidence, that the accident causing the death occurred in the manner he contends it did. We think the evidence here justified such a finding, and that there is no cause for sustaining a challenge to the sufficiency of the evidence.' "

The Court then said:

"The cause of an accident, like any other fact may be proven by circumstantial evidence. * * * It is true, as we have often held, a verdict may not rest upon pure speculation, but the correlative is also true that a verdict resting upon competent evidence may not be set aside upon pure speculation."

In *Sandanger v. Carlisle Packing Co.*, 192 P. 1005, 112 Wash. 480, the Washington Supreme Court in laying down the rule said:

"Speculation and conjecture, when used in this connection, means the same thing. The cause of an accident may be said to be speculative when, from a consideration of all the facts, it is as likely that it happened from one cause as another. As soon as the balance of possibilities is broken, the jury is put to the burden of weighing the evidence."

The balance of possibilities was broken in this case when it was proven by a preponderance of the evidence that the clutch was so worn that it would not stay in mesh and that the stick or lock was prepared and used to lock the clutch in place, making it difficult to dis-

engage it in time to prevent the deceased's leg from being pulled into and wound around the winch. This was the cause of the original injury, and the proximate cause of his death, even, if we assume that the septecemia germs entered the wound at the very instant it was opened. Again the balance of possibilities was broken when the defendant deglected to use their first aid kit. Also when they neglected to examine the wound and ascertain what any ordinary layman could see, that his leg was practically torn off, and with such information easily ascertainable, they neglected to call Dr. Sturdevant, who could have been present within about thirty minutes, and could have and would have provided the necessary treatment to render innoxious the germs, if any, then in the wound, and to prevent additional germs from entering. Again the balance was broken when the owner of the boat, while standing near the handle negligently failed to shut off the winch. The evidence was sufficient on all these issues to put the jury to the burden of weighing it, and they did weigh it and found each and all of these facts against the appellants, and rested their verdict upon competent evidence "and it may not be set aside upon pure speculation."

The appellants, in effect, say we cannot be held for our ommission to give the deceased medical care and

attention, because it is impossible for respondent to prove, and she did not prove, that Mario Anelich would have lived if he had had prompt and proper medical attention, in other words, they say, yes, we neglected him; we didn't call the doctor as soon as we could have; we didn't use our first aid kit; we didn't look at his wounds, but shifted him onto another vessel and abandoned him, but all that is of no consequence; Mr. Anelich is dead and while he may have died from our neglect to give him care, you can't prove it and any finding of the jury on that fact would be mere speculation and conjecture. That as it is physically impossible to now say that had we used due care in the prompt use of our first aid kit and supplied for him immediately the most efficient medical care, skill, attention and hospitalization at the very earliest moment possible, he still may not have lived, at least it cannot be proven that he would have; by our neglect to give him care we have put the matter beyond the scope of proof and without proof of that fact, there is no casual connection, and we cannot be held to account for our neglect, and we now ask this Court to permit us to plead and take advantage of our own independent conduct as a defense to this lawful claim, because this issue has, by our negligence, been put beyond the possibility of proof.

Instruction No. 6 given by the Court, and to which there was no objection, thereby making it the law of the case read in part as follows:

> "To sustain this burden it is not necessary, however, that the plaintiff show that the injuries received resulted in death immediately, nor is it necessary to prove that the injuries received were the sole cause of death, but if the injuries sustained at the time of the accident set in motion other forces which contributed to produce death, then the wrongdoer is liable."

The negligent opening of this wound made it possible to allow germs to enter, either at that time or by the negligent delay and handling of the deceased thereafter; that the injury set in motion the germs which contributed to produce death. It is entirely probable that the moving of this man from the large boat to the skiff and from the skiff to another boat, without a SPLINT upon his leg further opened his wounds and allowed additional germs to enter. We submit that the jury were warranted in finding that the negligence of the petitioners was the proximate cause of the death.

CONCLUSION

In conclusion we respectfully submit:

(1) That prior to and since the decision in the Osceola case it has been the recognized law that a seaman does not assume the risk of an unseaworthy vessel

or defective appliances, even though he continued to work with knowledge of the defect; that by the passage of the Jones Act Congress intended to and did enlarge the rights of seamen; that this court should continue to construe the act commensurate with the beneficient purpose for which it was enacted; that since the passage of the Jones Act the weight of the better authority, and the decisions of this court, so far as applicable, have laid down the rule contended for by respondent; that by departing from this rule the court would do violence to the Jones Act and overrule the Osceola case and a long line of well considered opinions so construing and following that case, this, we do not believe the court should do.

(2) Even if the court does not hold strictly to this view, still under the facts in the case at bar there was a total failure of proof of either branch of the defense of assumption of risk, and there was no issue on this defense, under the proof and offered instructions to be submitted to the jury.

(3) That under the evidence the jury was warranted in finding that the injury proximately resulted from the personal negligence of the owner in failing to disengage the clutch, which negligence, under the Act, Anelich could not have assumed.

(4) That the other questions raised by appellants are questions of fact, all of which have been foreclosed by the verdict of the jury, and should not be disturbed by this court.

It is therefore respectfully submitted that the judgment of the lower court should be affirmed.

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March 21, 1936